

PROPOSAL TO REVISE OPD’S DEPENDENT/NEGLECT PROGRAM

For Discussion at the February 15, 2013 Public Defender Commission Meeting

The Process

Investigation. § 41-3-201, MCA imposes on certain professionals and officials a mandatory duty to report to DPHHS suspected child abuse or neglect. Under subsection (1), when the professionals and officials “know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected by anyone[,]” they must report to DPHHS. Reports are taken by a centralized office. ARM 37.47.302, .303. If the department determines that an investigation is required, a social worker, the county attorney, or a peace officer shall promptly conduct a thorough investigation. The investigating social worker shall furnish a written report within 60 days of commencing an investigation. § 41-3-202(1), (6), MCA. If the social worker, a peace officer or the county attorney has reason to believe a child is in immediate or apparent danger of harm, that child may be immediately removed and placed in a protective facility. If this is done, an abuse and neglect petition must be filed within five working days. § 41-3-301(1), (6), MCA.

DPHHS has implemented a safety intervention system, the Montana Safety Assessment and Management System (SAMS), which is designed to ensure that safety assessment guides decision-making throughout the life of the case. Child and Family Services Policy Manual, 201-2 (rev. 01/12).¹

Initiation of Proceedings. Sec. 41-3-422, MCA sets out the procedures for filing an “abuse and neglect” petition. The state may request in the petition any of the following:

¹ Child abuse or neglect means either actual physical or psychological harm to a child OR substantial risk of physical or psychological harm to a child OR abandonment. The term includes actual harm or substantial risk of harm by the acts or omissions of a person responsible for the child's welfare. The term does not include self-defense, defense of others, or action taken to prevent the child from self-harm that does not constitute physical or psychological harm to a child.

-immediate protection and emergency protective services, pursuant to § 41-3-427. If the parent, custodian or attorney for the child disputes the material issues of fact contained in the affidavit filed in support of the petition, the person may request a contested show cause hearing within 10 days of service of the petition and affidavit;

-temporary investigative authority into allegations of child abuse, neglect or abandonment, pursuant to § 41-3-433, MCA. An order for temporary investigative authority may not be issued for a period longer than 90 days;

-temporary legal custody, pursuant to § 41-3-442, by which the department may place a child in care provided by a custodial or noncustodial parent, kinship foster home, youth foster home, youth group home, youth shelter care facility, or institution. An order may be in effect for no longer than 6 months, but may be renewed for an additional 6 months;

-long term custody, pursuant to § 41-3-445;

-appointment of a guardian for a child who has been placed in the temporary or permanent custody of the department, upon the petition of the department or guardian ad litem, enter an order appointing a guardian, pursuant to § 41-3-444;

-termination of the parent-child legal relationship, pursuant to § 41-3-607;

-any combination of these provisions, or any other relief that may be required for the best interests of the child.

Termination of parental rights requires a separate trial-type hearing. Termination is required in certain circumstances.²

² **41-3-604. When petition to terminate parental rights required.** (1) If a child has been in foster care under the physical custody of the state for 15 months of the most recent 22 months, the best interests of the child must be presumed to be served by termination of parental rights. If a child has been in foster care for 15 months of the most recent 22 months or if the court has found that reasonable efforts to preserve or reunify a child with the child's parent or guardian are not required pursuant to 41-3-423, a petition to terminate parental rights must be filed unless [certain circumstances are present]

The Current Situation

OPD is Responsible for Assigning Counsel to all Parties. The filing of a petition under § 41-3-422 triggers the right to counsel.

Sec. 41-3-422(11), MCA states that “any party in a proceeding pursuant to this section is entitled to counsel as provided in 41-3-425.” Subsection (13)(a) requires service of the petition on the parent, guardian or legal custodian, and written notice advising that person of the “right, pursuant to 41-3-425, to appointment or assignment of counsel if the person is indigent or if appointment or assignment of counsel is required under the federal Indian Child Welfare Act, if applicable[.]” Sec. 41-3-425(2), MCA provides that any indigent parent, guardian or legal custodian of a youth in a removal, placement or termination proceeding is entitled to assigned counsel. The court also shall appoint counsel for any child when a guardian ad litem is not appointed. The court may appoint counsel for a guardian ad litem or court-appointed special advocate, and for any child or youth.

The right to counsel means the right to the effective assistance of counsel. The Supreme Court, in In re A.S., 2004 MT 62, 320 Mont. 268, 87 P.3d 408, recognized that a natural parent's right to the care and custody of his or her child is a fundamental liberty interest which must be protected by fundamentally fair procedures. Fundamental fairness requires that a parent be represented by counsel at proceedings to terminate parental rights. The Court deemed it “self-evident that the right to counsel carries with it a concomitant requirement that such counsel be effective.” 2004 MT 62, ¶¶ 12, 20.³

Assignment of Counsel in the Regions. The general OPD practice is to assign a staff attorney to represent a parent in a DN case. To avoid a conflict of interest, cases are assigned to the Conflict Coordinator to assign conflict counsel to all other parties entitled to representation.

³ The U.S. Supreme Court has held that “[t]he liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. ... ‘It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.’” Troxel v. Granville, 530 U.S. 57, 65-66 (2000)

Most regions do not currently require parents to provide financial information or otherwise determine eligibility for appointment of counsel. The consensus of those regions which do not conduct eligibility review is that the review is not necessary, as the substantial majority of DN clients are indigent.

OPD does not have a uniform method of assigning counsel or staff to DN cases. In most regions, there is not a dedicated DN attorney or unit which primarily handles DN cases. Rather, attorneys are assigned to DN cases as well as to other non-DN cases.

Case Load Increases. DN cases decreased slightly from FY 2010 to FY 2011, as 39 fewer cases were opened in 2011. Cases increased dramatically in FY 2012, as OPD experienced an increase of 842 new dependent or neglect cases.

OPD uses a different method of counting DN cases than the district courts. If a mother with three children is involved in an abuse/neglect petition, the clerk of court would open three new cases – one for each child.⁴ OPD’s method would result in more than 3 new cases. The region in which the petition was filed would represent the mother, and open three new cases – one for each child. The kids might be entitled to counsel, and if so, cases would be opened. The father for each child would be entitled to counsel, and so three new cases would be opened for each father.

⁴ According to District Court Uniform Caseload Filing Standards for DN cases, a separate case file shall be opened and case number assigned for each child. A comment to the Standards notes that many children have different putative fathers. “The purpose behind this rule is to protect confidential information related to one child from an individual who may be related to a stepbrother or a stepsister, but not related to the child in question.”

The case is deemed opened upon the filing of a petition or complaint. It is deemed closed upon issuance of an order to terminate parental rights or other final order. A case file shall be reopened upon the filing of a petition for review of a permanency plan. The file shall be closed upon the issuance of a post-termination court order.

The following chart lists the total number of DN cases in FY 2012, and the increase or decrease over the prior year:

<u>Region</u>	<u>FTE slots</u>	<u>Cases Opened in FY 2012</u>	<u>increase/(decrease)</u>
1 – Kalispell	17.25	279	(46)
2 – Missoula	23.5	369	234
3 – Great Falls	12	747	181
4 – Helena	11	229	100
5 – Butte	9	173	14
6 – Havre	2	271	214
7 – Lewistown	2	80	20
8 – Bozeman	10	145	(4)
9 – Billings	19.75	527	69
10 – Glendive	3	109	27
11 – Miles City	2	<u>132</u>	<u>33</u>
		3,061	842 ⁵

Costs. The average cost of a DN case in FY 2012 was \$759. The actual annual cost in FY 2012 for DN cases was about \$2.3 million. The cost for the additional 842 cases in FY 2012 is estimated to be \$238,146.

Disparity in Resources. The state is represented by county attorneys who receive competitive salaries and benefits, have supervision, are provided training, and who have the cooperation and assistance of Child and Family Services personnel, including social workers, counselors and therapists, and the active assistance of law enforcement. Reports of suspected abuse or neglect are often

⁵ OPD uses a different method to count open DN files than the method used by the district courts.

generated by persons of perceived high credibility, such as law enforcement officers, medical personnel, and teachers.

OPD staff attorneys work under heavy caseloads, with inadequate compensation. Supervising attorneys generally have not received specialized training in supervision and management of civil cases. OPD lacks adequate investigative staff, has no social worker staff, and has no protocol for the utilization of experts in civil cases. There appears not to be a protocol for obtaining discovery from the prosecution. A staff attorney who handles a large DN caseload told me that she spends lengthy periods of time copying file materials from the county attorney's file.

Conflict attorneys suffer from the same set of deficits as OPD staff.

DN cases are given a high priority by the courts. The schedules and statutory time limits create logistical problems for already-burdened staff attorneys.

System Stressors. Several factors suggest that the spike in DN cases in FY 2012 will not abate. The increase appears to be attributable to the fall-out from at least one high-profile case in which DPHHS was strongly criticized. In October, 2011, a 2-year old girl was beaten to death in Great Falls. For a period of several months prior to the girl's death, her grandmother reported suspicions about the assailant to the Great Falls Child and Family Services office. The girl's family publicly blamed DPHHS for failing to take action to save the young girl. Region 3, of which Great Falls is a part, experienced a significant spike in DN filings in FY 2012. Hill County, located in Region 6 adjacent to Great Falls, also experienced a significant increase in DN filings.

DPHHS received criticism from other sources as well. DPHHS surveyed mandatory reporters, and found that 60 % of those who responded felt there was a lack of follow-through and communication from the department. A director of a child care center in Great Falls was quoted in the newspaper in August, 2012 as saying that the local child protection system had not improved.

Thus, the increase in filings may be the result of the agency's response to criticism and pressure, with a sort of "ripple effect" spreading throughout the state. The increase may also be attributed in part to changes in policy. OPD regional

deputies and attorneys in regions affected by the case increases report that it appears petitions are being filed in situations which would not have warranted filing a petition in years past, and that the state seems to be pushing more parental-rights termination cases to trial than before.

It seems unlikely that the increase in petitions being filed will go back to the FY 2011 levels. In fact, recent developments pushed by DPHHS will continue to affect OPD's ability to provide legal services to parents, children and third parties.

The October, 2012 edition of *The Interim*, a monthly newsletter published by the Legislative Services Division, contained an article which discussed actions taken by the Children, Families, Health and Human Services (CFHHS) Interim Committee. According to the article, the Committee met with representatives of DPHHS, "not long after the deaths of several young Montana children due to child abuse." CFHHS approved four committee bills for the upcoming session:

- a bill to create an Office of the Child and Family Ombudsman, whose authority would include filing amicus curiae briefs on behalf of a parent or child;

- a bill which would require DPHHS to pursue a process of national accreditation for its child and family service workers;

- a bill which would allow additional family members to get access to information, and allow DPHHS to respond to mandatory reporters;

- a bill which would transfer \$10 million from the general fund to the Endowment for Children. Interest from the endowment goes to a fund which makes grants to local programs designed to prevent or alleviate the effects of child abuse and neglect.

Societal pressures also need to be considered. In 2011, 14.8 % of Montanans lived below the poverty level, an increase of .2% over the prior year. In FY 2012, 12.8 % of the population received benefits through the Supplemental Nutrition Assistance Program (SNAP).

RECOMMENDATION/DISCUSSION

Parental Representation Models

Three types of representation models are used in the states. Many of these models limit their client base to parents in child welfare cases.⁶ I've looked at these models to see if we could adapt our system to fit the model; alternatively, I've considered these parent representation models as an option if we are able to relinquish representation of children, or if we wish to set up a separate program for representation of children.

The three models are:

Contract/panel model: this system is made up of an administrative staff, with the case load assigned to a panel of contract attorneys, who are provided with resources, compensation, training, and standards compliance.

An example of this model is the Counsel for Child Abuse and Neglect Office of the Family Court branch of the District of Columbia Superior Court. The office is staffed with a branch chief, who is an attorney, a social worker, and deputy clerks. The chief and social worker providing training and support to court assigned counsel, and the clerical staff handles case assignment processing, financial eligibility, and inquiries. The Office also works with the Children's Law Center which has an agreement with the court to provide representation for some children and caretakers in child abuse and neglect cases. Children's Law Center has staff attorneys who act as guardians ad litem. This organization also recruits and trains pro bono attorneys to represent caretakers who are considering seeking adoption, guardianship, or legal custody of a neglected child.

Institutional parent representation model: this type of system generally is comprised of offices with full time staff of attorneys, investigators and social workers. These models typically represent parents only.

Washington State has an interesting parent-representation model. In 2000, the state legislature funded a pilot program with three objectives: (1) provide better representation to parents; (2) decrease the number of court delays caused by

⁶ I'm using the term "child welfare" to describe a broader context of cases, which in Montana might include what we refer to as "dependent/neglect" cases.

overburdened parents' attorneys; and, (3) increase compensation for parents' attorneys. One program was set up in a rural county, in which the court contracts part-time with private attorneys. A second program was set up in an urban county in which the court used a public defender's office with full-time parents' attorneys. The programs appear to have been successful. For example, the rate of family reunifications before the PD program and after the PD program increased over 35%. In those counties that did not implement the PD program, the rate of family reunification actually decreased.⁷

Hybrid model: this system generally is comprised of a panel of contract attorneys who handle the majority of case assignments, and a state or regional office with staff who may handle some case assignments, oversee the panel and supervise the system. Two systems which provide representation both for parents/custodians and children in child welfare cases are discussed below.

Massachusetts: The Child and Family Law Division (CAFL) oversees all court-appointed child welfare attorneys. Approximately 90% of dependency cases are handled by a panel of qualified private attorneys overseen by CAFL. Staff attorneys handle the remaining 10% of the cases.

New Jersey: New Jersey was sued for inadequacies in its handling or supervision of child welfare cases, following the deaths of a couple of kids. As a result, the state created two separate programs within the public defender agency: one program (OPR) represents parents in child welfare cases, and a separate program (OLG) represents children in those cases.

The Office of Parental Representation provides legal representation to parents in cases of alleged neglect or abuse of a child, and in parental rights termination cases, through staff attorneys and through contracted private counsel.

The Office of Law Guardian provides legal representation to children in family court matters involving allegations of abuse and neglect against parents or other caregivers, or in cases involving termination of parental rights, through staff attorneys.

⁷ A reunification is defined as a dependency case dismissed by court order 6 months or more after a child has been returned home to a biological parent or legal custodian.

The two programs are separated as much as possible, to the point where the offices are housed in separate buildings whenever possible. Firewalls are installed on the computers, and lines of management are kept distinct. Each program reports to the Chief Public Defender, but the Chief does not have any decision-making authority in terms of cases handled in either program. Contract attorneys cannot represent both parents and kids.

OPTIONS

1. Reduce the type of case in which OPD must assign counsel

The mandate to assign attorneys to represent children in DN cases is a significant cost factor. OPD could seek to minimize costs by getting out from under the duty to assign counsel. This would require an amendment to current statutes. Currently, §41-3-425 requires a district court to appoint representation for the children after the State has filed a petition alleging abuse or neglect, if a guardian ad litem is not appointed. A court has discretion to appoint counsel for the children in addition to a GAL. See, In re K.H., 2012 MT 175, ¶28, 366 Mont. 18, 285 P.3d 474. An amendment which removes the obligation to appoint counsel for children would reduce overall costs to OPD.

The program could be turned over to the Montana Supreme Court, Office of the Court Administrator. Colorado has implemented a similar model, the Office of Child Representation. That office works with contract attorneys to provide GAL services, using a best interests model of representation.

2. Create a Separate “Contract” Program.

OPD could implement a “contract/panel” model, by which an administrative staff could assign cases to contract attorneys, supervise the work, handle payment of claims, and handle training. This model would free up staff attorneys to handle other cases. This model has several drawbacks, however, including: (1) we do not have a sufficient number of qualified private attorneys to absorb the increased need for counsel; (2) it likely would be more expensive, as private attorneys cost more

per hour than staff attorneys; and (3) there would still be a need to address conflict situations, such as representation of both parents and children in a DN case.

3. Create a Separate Civil Program with a Separate Budget

As a first step, we should define the purpose of having a viable, effective DN system, and identify goals to which we aspire, and by which we can assess performance.

Managing our costs and expenses is the primary goal from a systemic view. OPD could create a separate budget program, so that the costs and expenses are allocated to a separate budget. The benefit would be to gain some measure of control over costs and expenses, and avoid having to allocate funds from other needs to address DN costs.

The following are suggested objectives to consider as performance benchmarks:

- assist parents in learning how to safely and appropriately care for their children
- help parents obtain visitation with their children
- help parents get counseling and other services
- help parents develop a record of participation in programs
- act as an advocate for parents to promote family reunification; alternatively, work with parents to secure placement of a child
- increase compliance with statutory time frames, and reduce continuances of cases due to case load issues
- challenge actions by DPHHS which fail to provide parents with access to services and programs to enable parents to have a realistic opportunity for reunification with children

Our new program, which I will call Program 4, can take a couple of different forms.

In one model, we can keep staff attorneys in Program 1, and salaries, costs and expenses would fall within the Program 1 budget. The Program 1 attorneys would be responsible for representing a parent or parents in a DN case. Program 4 would be created, with a separate and distinct budget. The Conflict Coordinator would administer Program 4, and would be charged with assigning counsel in DN cases.

For our FTEs, we would develop a case weighing standard, based on the total number of DN cases filed in the regions, and which would include consideration of the increase or decrease of DN case filings annually. For those regions which meet the standards, management could assign Program 4 attorneys and staff to those regions to handle DN cases exclusively.

For example, Region 1 had 279 DN cases in FY 2012, which was a decrease of 46 from the prior year. The 279 cases made up approximately 6% of the 4500 new cases Region 1 opened in FY 2012. In its combined offices (Kalispell and Polson), Region 1 has 17.25 attorneys (including the regional deputy), 8 support staff, and 2 investigators. Region 3 opened 747 new DN cases, which made up approximately 20% of the 3600 new cases it opened in FY 2012. These cases are handled by 12 attorneys, 6 staff, and 3 investigators. Region 3 would need more “Program 4” FTEs than Region 1, even though Region 1’s overall caseload is greater.

Region 6 opened 271 new DN cases, an increase of 214, which made up approximately 21% of the 1300 new cases it opened. This region has only 2 attorneys, 1 support person and 1 investigator. Region 5 opened 173 new DN cases, an increase of 14, which made up approximately 11% of the total of 1600 cases. Region 5 has 9 attorneys, 4 support staff, and 1.5 investigators. The realignment to a new Program 4 likely would require shifting or reassignment of staff, to cover the demands caused by the increase in DN cases in Region 6, while there would be no need to create a separate DN unit in Region 5.

If caseloads in a region fell below a threshold level for a defined period of time, the FTEs could be reassigned to criminal cases within the region. If criminal case loads increased beyond a threshold, the FTEs could likewise be taken from the DN case assignments and re-assigned a criminal caseload.

The Conflict Coordinator would assign counsel to other parties entitled to representation, and would handle the budget issues. Central office staff may be able to handle the payment process both for Program 1 and Program 4. The Conflict Coordinator would report to the Commission.

Selection and supervision of contract attorneys, training needs, and other matters would have to be coordinated between the training coordinator and the conflict coordinator.

A second option would be to create a separate, dedicated DN parental representation system within Program 4. In this model, one sub-group would be assigned to represent parents, and a second sub-group would handle the kids, GALs, etc. This model would have problems with supervision and avoidance of conflict issues.

4. Other Potential Options or Modifications

Other modifications to a model by which legal representation is provided to parents include:

- requiring parents to complete an indigence questionnaire.
- providing for assignment of counsel when a DPHHS social worker initiates an investigation, and before an abuse/neglect petition is filed. Assistance of counsel at this point might result in more cases being resolved early in the process.
- developing a uniform, state-wide mediation/dispute resolution procedure, as contemplated in § 41-3-422(12), MCA, with the goal of reducing the number of cases which proceed to a court hearing.
- developing a pool of persons who can assist attorneys and staff, such as a pool, group or class of social workers, possibly as part of a clinical program.